Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-322

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY,
a Delaware Corporation,
Petitioner,

vs.

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF ILLINOIS, FOR AND IN BEHALF OF THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The Petitioner, Toledo, Peoria and Western Railroad Company [called petitioner or TP&W], prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in April 3, 1979.[1]

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported as *Department of Transportation* v. *Toledo, Peoria & Western Railroad Company,* 75 Ill. 2d 436, 389 N. E. 2d 546, and the opinion of Illinois' intermediate Appellate Court is reported

1. Rehearing denied May 30, 1979.

under the same title at 59 Ill. App. 3d 886, 376 N. E. 2d 88. These opinions are Appendices A and B hereto.[2]

JURISDICTION

This is a condemnation case which, in present posture, involves the Just Compensation and Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitutions of the United States.

The judgment of the Court below was entered on April 3, 1979 and the petitioner filed a timely petition for rehearing which was denied on May 30, 1979. This petition for certiorari is filed on, or before, August 28, 1979.

Jurisdiction is vested under 28 U. S. C. §§ 1257(3), 2101(c).

QUESTION PRESENTED

The condemnation of petitioner's property was not within the scope of the original project and its purpose was to obtain fill material for construction of that project for less than its market value. The decision on review holds that the market value of the fill material cannot be considered in determining just compensation for its taking and the question is:

> Does the decision below violate petitioner's rights under the Just Compensation and Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> . . .; nor shall private property be taken for public use, without just compensation.

2. Appendix C is the notification from the Illinois Supreme Court that petition for rehearing was denied on May 30, 1979.

United States Constitution, Amendment XIV:

> No State shall . . . deprive any person of . . . property, without due process of law; . . .

STATEMENT OF THE CASE

Respondent, Illinois Department of Transportation [called respondent or State] is a Code Department of the State of Illinois with jurisdiction over the construction and operation of the Illinois highway system including the construction of Federal Aid Interstate Route No. 474 over the Illinois River from Bartonville through Creve Coeur, Illinois. The petitioner owned 42.6 acres of submerged land which was not part of the highway project but which was in near proximity thereto.

Respondent was fully and finally committed to the highway project on, or before November 15, 1965 and the taking of petitioner's 42.6 acres was not a part thereof. [R. C6, C41 and C62]. Moreover, the original project contemplated that all labor and materials (including fill material) for construction of the highway would be obtained through private contractors under competitive bidding procedures. [R. C226 through C235].

Prior to 1971 the State did in fact purchase fill material from private contractors who in turn purchased from petitioner's 42.6 acre submerged tract at 12¢ a cubic yard [R. C416 through C425]. When proprietary bids were requested for that part of the project over the Illinois River, petitioner again agreed to sell fill material from its submerged land at 12¢ a cubic yard but after the bids were submitted, they were rejected by respondent who then decided it could save from $2 to $2.50 per yard by condemning petitioner's 42.6 acre tract for a "just compensation" of $1,000. [R. C234 through C245, C436 through C444].

On February 3, 1971, respondent filed its petition for authority to condemn with the Illinois Commerce Commission[3] and stated that it needed such authorization because "approximately 1,700,000 cubic yards of river bottom material, including sand, will be required for construction of the highway road bed." [R. C9, C65 and C479].

The petition for condemnation was filed in the Circuit Court of Peoria County on June 17, 1971[4] and alleged that the taking was "for the purpose of removing and taking full and complete title to 1,200,000 cubic yards of suitable fill material." !R. C39].

Thereafter, respondent requested an immediate vesting of title ('quicktitle ('quick-tkae') under Ill. Rev. Stat., Chap. 47 §§ 2.1-2.3.[5] After evidentiary hearing, the trial court orally declared "that th economic advantages to the state and to the saving of the taxpayer make this property subject to taking by a public body for public use, then that is a proper subject of Eminent Domain." [R. C332]. With regard to its preliminary determination of just compensation the trial court verbally stated that "the TP&W has a merchantable item in the form of sand and gravel on its property and that it is the merchantable item being taken" and further found:

> [W]here you have merchantable material which is going to be removed within the next 3 to 5 months, it's apparent to me that the rule which is usually applicable is not applicable here and that the state should fairly pay for

3. Ill. Rev. Stat., Chap. 47 § 2.1 provides that "no land . . . owned . . . by . . . any common carrier engaged in interstate commerce shall be taken . . . hereunder . . . without first securing the approval of the (Illinois Commerce) Commission."

4. Under Illinois law, just compensation is to be determined by reference to valuation factors as of the date the petition is filed.

5. There are no issues concerning the interlocutory nature of the appeal nor concerning any of the procedures followed below. But by way of explanation, the Illinois statutes permit immediate vesting of title after a hearing which determines the propriety of the taking and makes a preliminary finding of just compensation which must be deposited in court pending later determination in a final adjudicatory jury trial.

> the fair cash market value of the materials which it intends to remove and use in its highway. . . . It has a known market value of recent origin and date which was formed between parties dealing at arm's length, that is an independant contractor and the TP&W . . . I would direct that a deposit in the amount of $100,000 be made as I feel this is the approximate value of the merchantable material which the state is acquiring of this 42.6 acres.[6] [R. C333].

Prior to the jury trial for final determination, respondent filed a "Motion In Limine"[7] seeking to exclude from the trial evidence regarding the prior sale of fill to independent contractors in connection with interstate 474 and regarding the cubic yards of fill already taken by the State. [App. B, A-7]. The motion was denied and "The trial court found: (a) the proper measure of damages to be submitted to the jury is the value of the land including the mineral content thereof; (b) the jury is entitled to know that the sole purpose of acquiring the land was to obtain the minerals; (c) there had previously been a contract arrived at in an arm's length transaction with a subcontractor for these materials." [App. B, A-7].[8]

6. Throughout, respondent has contended that as submerged river land petitioner's property has but a nominal value of $1,000 and that was the substance of its expert's testimony at the "quick-take" hearing. [R. C275 through C278].

7. Under Illinois procedures a "Motion in Limine" is a civil motion like a motion to quash in order to keep certain evidence from being heard by the jury.

8. The specific findings are quoted in the opinion of the Illinois Supreme Court [App. 3, A-2] including the following:

> It is apparent from the pleadings and the evidence taken at the 'quick take' hearing that the plans for Interstate By-Pass 474 called for a bridge across the Illinois River and across some lowlands near the property subject to this Petition for Condemnation. After the bridge was partially constructed, contracts were let to obtain fill material for a dike road inasmuch as a portion of the land is subject to flooding. In connection with these contracts, a subcontractor did purchase from the (TP&W) certain quantities of fill material from the area presently subject to this condemnation suit at an arm's length contract on the open market for 12 cents per cubic yard. Thereafter the state

(Footnote continued on next page.)

A proper interlocutory appeal was taken by the respondent to the Illinois Appellate Court. Focusing on the abstract rule "that it is the loss to the condemnee and not the gain to the condemnor which is to be considered in determining the value of condemned lands" [App. B, A-10] that court declared that "consideration of the market demand created by the contractors herein would be improper" [App. B, A-10], that "the introduction of testimony regarding the minerals already taken is clearly improper" [App. B, A-11] and then reversed.

Thereafter, petitioner's petition for leave to appeal under Rule 315 of the Rules of the Illinois Supreme Court [Ill. Rev. Stat., Chap. 110A § 315] was granted and that court affirmed both the ruling and the reasoning of the intermediate appellate court, [App. A, A-1—A-6], *viz*:

> To permit proof of the market value for the fill material created by (State's) construction project would result in the land being valued not as land, but as a source of fill material. [A-5].
>
> ---
>
> The same objection would arise to proof of a prior agreement to purchase the fill material of 12 cents per cubic yard. That transaction resulted not from the value of the land as land, but from the fortuitous circumstance that by reason of its proximity to the bridge project, fill material had that value at that particular time and place. [A-5—A-6].

In both its brief [pp. 8, 18-21] and its petition for rehearing [pp. 2-4], petitioner raised and preserved the federal constitutional question, in sum, as follows:

> If the decision on review is correct as a matter of Illinois law, then it violates the Just Compensation and Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

(Footnote continued from preceding page.)

sought to condemn the subject property and filed this Petition, the only use to be made of this property being the extraction of the fill material for the nearby right-of-way roadbed.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Contradicts Federal Constitutional Principles Declared in Relevant Decisions by the Supreme Court of the United States.

"The Fifth Amendment of the Constitution of the United States provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. (Citation omitted). The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken. (Citations omitted)." [*United States* v. *Miller*, 317 U. S. 369, 373 (1942)]. And at pages 376-377 of the *Miller* case, *supra*, this Court declared:

> If a distinct tract is condemned in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands *it must pay their market value as enhanced by this factor of proximity*.[9] [Emphasis added.]

It has long been the rule that federal standards under the Just Compensation Clause of the Fifth Amendment are binding upon the states under the Due Process Clause of the Fourteenth Amendment. [See: *Malloy* v. *Hogan*, 378 U. S. 1, 4 (1964) citing *Chicago B & Q Ry. Co.* v. *Chicago*, 166 U. S. 226 (1896)]. As stated by the Court in *Chicago B & Q Ry. Co.* v. *Chicago, supra*, at 241: "a judgment of a state court, even if it

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9. The Illinois Supreme Court's ruling that "That transaction resulted not from the value of the land as land, but from the fortuitous circumstance that by reason of its proximity to the bridge project, fill material had that value at that particular time and place" [*ante*, 9] is patently at war with this federal constitutional principle.

be authorized by statute, whereby private property is taken for the state or under its direction for public use without compensation made or secured to the owner, is upon principle and authority wanting in due process of law required by the 14th Amendment to the Constitution of the United States and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

Here, it was not the title to the land that was taken but it was the title to the fill material located on that land[10] and it is conceded by all concerned that the taking was neither within nor contemplated by the scope of the original project. Under Illinois law just compensation must be determined in light of relevant factors as they existed when the condemnation was filed on June 17, 1971. On, and prior to that date, the property being taken had a value of 12 cents a cubic yard to the petitioner and on June 18, 1971, it had precisely the same value to the respondent.

Fairly read, the decision on review holds that even though the identical element of value exists both before and after the taking, it somehow disappears at the moment of taking. In a similar context, this Court has stated: "Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice." [*Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 338 (1893)].

II.

The Federal Question Is Substantial and Should Be Resolved by the Supreme Court of the United States.

Under Illinois law "economic advantage to the state and to the . . . taxpayer" constitute a public purpose sufficient to

10. Indeed, the original condemnation petition alleged that respondent "seeks an easement . . . for a period of 3 years for the purpose of removing and taking full and complete title to 1,200,000 cubic yards of suitable fill material." [R. C39].

support the power of Eminent Domain [*ante,* 6]. Thus, the federal constitutional issue must be tested against that background in terms of "just compensation".

The thing that is involved here is not the acquisition of land for right-of-way purposes and the rule "that it is the loss to the condemnee and not the gain to the condemnor which is to be considered in determining the value of condemned lands" [*ante,* 8-9] isn't even relevant. The thing that is involved here is the condemnation of fill material for a nominal sum of $1,000 when and where there was an existing market having a value of more than $100,000. When one taxpayer must sacrifice $100,000 so that all others can be economically advantaged to the same extent, there is, we think, an invidious discrimination which is constitutionally impermissible. Present-day efforts to satisfy taxpayers as a class clearly indicate that the decisions below will lead other governments to soon follow suit!

CONCLUSION

For the foregoing reasons, and for others implicit therein, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX A

(No. 50929.—Judgment affirmed.)

THE DEPARTMENT OF TRANSPORTATION, Appellee, v. TOLEDO, PEORIA & WESTERN RAILROAD COMPANY, Appellant.

Opinion filed April 3, 1979.—Rehearing denied May 30, 1979.

MR. CHIEF JUSTICE GOLDENHERSH delivered the opinion of the court:

Petitioner, the Illinois Department of Transportation, formerly the Department of Public Works and Buildings, filed an action in the circuit court of Peoria County to condemn 42.6 acres of land owned by respondent, Toledo, Peoria & Western Railroad Company. Petitioner moved that it be immediately vested with fee simple title (Ill. Rev. Stat. 1971, ch. 47, par. 2.1 *et seq.*), the court made a preliminary finding of just compensation, and funds in the required amount were deposited by petitioner and withdrawn by respondent. Subsequently, petitioner filed a motion *in limine* to exclude certain evidence at the trial to determine just compensation. The circuit court denied the motion and included in its order the findings requisite to an application for leave to appeal. (Supreme Court Rule 308 (58 Ill. 2d R. 308).) The appellate court allowed petitioner's application for leave to appeal and reversed the order of the circuit court (59 Ill. App. 3d 886). We allowed respondent's petition for leave to appeal.

In stating the issues presented, and announcing its rulings, the circuit court said:

> "It is apparent from the pleadings and the evidence taken at the 'quick take' hearing that the plans for Interstate By-Pass 474 called for a bridge across the Illinois River and across some lowlands near the property subject to this

Petition for Condemnation. After the bridge was partially constructed, contracts were let to obtain fill material for a dike road inasmuch as a portion of the land is subject to flooding. In connection with these contracts, a subcontractor did purchase from the defendant, Toledo, Peoria & Western Railroad, certain quantities of fill material from the area presently subject to this condemnation suit at an arm's length contract on the open market for 12 cents per cubic yard. Thereafter the state sought to condemn the subject property and filed this Petition, the only use to be made of the property being the extraction of fill material for the nearby right-of-way roadbed.

It is the ruling of this Court that the proper measure of damages to be submitted to the jury is the value of the land including the mineral content thereof; that the jury is entitled to know that the sole purpose of acquiring the land was to obtain minerals; that there had previously been a contract arrived at at arm's length by subcontractor for these minerals for this purpose a short period prior to the filing of this Petition, because each of these facts would have been considered by a willing buyer and a willing seller in determining what market price might be established for this property at the time of the filing of the Petition for Condemnation."

The circuit court certified the following questions for interlocutory appeal:

"In determining the amount of damages for land taken, where the purpose of the taking is not for right of way but solely to acquire fill from nearby land:

(a) Is the proper measure of damages the value of the land, considering but not limited to the value of the fill material to be extracted?

(b) May evidence be introduced that the improvement is creating a 'one time' market for the fill material which a willing buyer and seller would consider in arriving at a fair cash market value at the time of the filing of the petition?

(c) May the fact be shown that in the earlier stages of the improvement a contractor in an arm's length purchase paid to owner $.12 per cubic yard for fill material for the improvement?

(d) May the actual amount of fill material taken after a 'quick take' and before trial be admitted into evidence?"

The appellate court held that the land taken was to be valued at its fair cash market value, as a whole, for its highest and best use; that the land included all the minerals, improvements and appurtenances connected therewith, all of which may be considered as factors in the determination of the fair cash market value "but under no circumstances is the fair cash market value to be the sum of such factors." (59 Ill. App. 3d 886, 890.) It held the evidence to which questions (b), (c) and (d) refer to be inadmissible.

Respondent contends that to be justly compensated for the taking it must be paid a sum computed by multiplying the number of cubic yards of fill material removed by 12 cents per yard, and that anything less would violate the provisions of the fifth amendment to the Constitution of the United States. The People contend that just compensation for the taking must be determined on the basis of the land as land, and not on the basis of determining the cubic yards of fill material removed.

In *Department of Public Works & Buildings* v. *Oberlaender* (1969), 42 Ill. 2d 410, petitioner sought to condemn approximately 44 acres of a tract of land which for many years had been used as a sand quarry. Witnesses for the landowner had considered the worth of the sand deposits separately in determining their opinions as to the value of the land.

The court said:

"It is not questioned here that the measure of compensation for land taken in a condemnation proceeding is the fair cash market value of the property for its highest and best use. Fair market value can be defined as the price for which the property would sell under ordinary circumstances surrounding the sales of property, assuming both an owner willing to sell and a purchaser willing, but under no compulsion, to buy. (*Forest Preserve Dist.* v. *Ilahn*, 341 Ill. 599, 602; see, *Department of Public Works and Buildings*

v. *Filkins,* 411 Ill. 304, 307.) Concerning the fair market value of land containing mineral deposits this court has stated that: 'The rule is that compensation must be estimated for the land as land, with all its capabilities, and if there is timber on it, or coal, oil or other minerals under the surface, they are to be considered so far as they affect the value of the land but they cannot be valued separately.' (*Forest Preserve Dist.* v. *Caraher,* 299 Ill. 11, 17; accord, *Department of Public Works and Buildings* v. *Hubbard,* 363 Ill. 99, 102; see also *City of Chicago* v. *Central National Bank,* 5 Ill. 2d 164, 175; *Chicago Land Clearance Com.* v. *Darrow,* 12 Ill. 2d 365, 372.) Putting it somewhat differently, where, as here, the property is not taken for the purpose of obtaining the minerals or a going business (see *City of Chicago* v. *Farwell,* 286 Ill. 415, 423; 29A C. J. S. Eminent Domain, sec. 174, p. 737, note 87), it is improper to appraise separately the mineral deposit and add its value to the value of the land without the deposits (4 Nichols on Eminent Domain 13.22; 1 Orgel, Valuation under the Law of Eminent Domain, 2d ed. sec. 165, p. 672; Jahr, Law of Eminent Domain—Valuation and Procedure, sec. 151; see *Department of Public Works and Buildings* v. *Lotta,* 27 Ill. 2d 455, 456.) It is proper however, for the owner to establish the existence of valuable mineral deposits on the real estate being valued and in doing this to show the character of the deposit(s) and to what extent it enhances the land's market value. *Forest Preserve Dist.* v. *Caraher,* 299 Ill. 11, 17-18; *Forest Preserve Dist.* v. *Kercher,* 394 Ill. 11, 23." (42 Ill. 2d 410, 415-16.)

Citing *Oberlaender,* respondent argues "that where, as in this case, the property is taken solely for the purpose of obtaining the minerals, it is not only proper, but constitutionally required, that the mineral deposit be valued separately at its per unit market value and the trial court has twice found that the fill material "has a known market value of recent origin and date which was formed between parties dealing are arm's length' at 12 cents a cubic yard." It argues too that the value of the property taken was 12 cents per cubic yard even though it was the

proximity of the original public improvement which created the market and the enhanced value. In support of this position it contends that the original petition sought to condemn only the fill material and the taking of the 42.6-acre tract was not within the scope of the original project, and that when the petitioner decided to take the land the per cubic yard market value had already been established. It argues that it follows from this that the value can be determined by multiplying the number of cubic yards taken by the unit price of 12 cents per cubic yard.

We agree with the circuit and appellate courts that the proper measure of damages is the value of the land taken, considering all the factors enumerated in *Oberlaender.* To permit proof of the market for the fill material created by petitioner's construction project would result in the land being valued not as land, but as a source of fill material. This is contrary to the rule enunciated in *Department of Public Works & Buildings* v. *Oberlaender.*

The same obejction would arise to proof of a prior agreement to purchase the fill material at a price of 12 cents per cubic yard. That transaction resulted not from the value of the land as land, but from the fortuitous circumstances that, by reason of its proximity to the bridge project, fill material had that value at that particular time and place. Such proof would clearly be violative of the long-established requirement that in fixing the value of land all the factors be considered, and that it not result from a totaling of the various factors.

The evidence concerning the amount of fill material actually taken from the land would be inadmissible. It is well established that the valuation must be fixed as of the date of the taking, and as of the date of taking there was no way to determine the amount of fill material which would be excavated from the land condemned. Evidence of what occurred subsequent to the valuation date may not be considered.

For the reasons stated, the judgment of the appellate court is affirmed.

Judgment affirmed.

APPENDIX B

THE DEPARTMENT OF TRANSPORTATION, Petitioner-Appellant, v. TOLEDO, PEORIA & WESTERN RAILROAD COMPANY, Respondent-Appellee.

Third District No. 77-305
Reversed and remanded.

Opinion filed May 15, 1978.

MR. JUSTICE SCOTT delivered the opinion of the court:

This is an interlocutory appeal from the Circuit Court of Peoria County. The purpose of this appeal is to determine certain evidentiary matters which are to be introduced at a subsequent trial to determine just compensation for the taking of property by eminent domain.

On June 17, 1971, the Department of Public Works and Buildings of the State of Illinois (hereinafter called the State) filed a petition for condemnation against the Toledo, Peoria & Western Railroad (hereinafter called the Railroad) and thereby sought to remove material for a period of three years from a 50-acre tract belonging to the Railroad. On August 31, 1971, leave was granted to file an amended petition for condemnation which sought fee title to 42.6 acres. The land involved is located beneath the Illinois River. The material to be taken would be used in the construction of Interstate Highway 474. It must be clearly understood that the land sought will not be used for classic road building purposes, but rather minerals will be removed from the land and used in the road construction.

On December 28 and 29, 1971, a hearing was held on the vesting of title pursuant to section 2.1 of the Eminent Domain Act (Ill. Rev. Stat. 1977, ch. 47, par. 2.1). The trial court found that the eminent domain procedure was proper and that the

preliminary just compensation was $100,000. The required amount was deposited and on April 25, 1972, title to the 42.6-acre parcel was vested in the State. The State has already begun to remove fill material.

On June 11, 1975, the State filed a motion in limine seeking to exclude certain evidence from trial: (a) regarding the cubic yards of fill already taken in connection with the Interstate 474, and (b) regarding a prior sale to a contractor in connection with Interstate 474.

The matter was then set for trial.

The Railroad filed a motion for partial summary judgment and also opposed the motion in limine. On May 9, 1977, the trial court denied the motion for partial summary judgment and the motion in limine. The trial court found: (a) the proper measure of damages to be submitted to the jury is the value of the land including the mineral content thereof; (b) the jury is entitled to know that the sole purpose of acquiring the land was to obtain the minerals; (c) there had previously been a contract arrived at in an arm's length transaction with a subcontractor for these materials to be used for this purpose a short period prior to filing of the petition.

This last part of the order is in dispute.

On June 29, 1977, an order was entered certifying questions for interlocutory appeal.

The first issue presented on appeal is whether the value of the fill material to be extracted should be a consideration in arriving at the fair cash market value of the land taken.

The State argues that land must be valued as a whole and not as the sum of its parts. It also argues that any mineral content on the land cannot be valued separate from the land, but must be considered as part of the value of the land. Therefore, the value of fill material to be extracted from the land should not be considered in determining the fair cash market value of the land.

The Railroad argues that while the State is correct when speaking of land per se, other rules must apply for the taking of fungible property.

The land sought here is not land in the usual sense. It is part of the bed of the Illinois River. The Railroad is not using the land as part of its roadbed, for a switch yard, terminal, or other structure, or for income purposes. The Railroad argues that the minerals deposited by the river on that part of the river bed may be extracted and used as levee materials in developing an industrial park along the rail line. The record does not show that this is presently being done.

The Railroad further argues that if the taking of the land for the minerals was the only purpose of the taking and the sole reason for the taking was the economic advantage to be gained thereby, then the minerals should be valued separately from the land because the State does not want the land and considers it incidental to the minerals.

• 1, 2 We believe the correct rule to be that land is to be valued as a whole for its highest and best use and that land includes all the minerals, improvements and appurtenances connected with the land. The proper measure of the value of land is its fair cash market value. (*Department of Public Works & Buildings* v. *Oberlaender* (1969), 42 Ill. 2d 410, 247 N. E. 2d 888; *City of Chicago* v. *Central National Bank* (1955), 5 Ill. 2d 164, 125 N. E. 2d 94.) No factor connected with the land is to be valued separately. *Department of Public Works & Buildings* v. *Oberlaender* (1969), 42 Ill. 2d 410, 247 N. E. 2d 888; *Forest Preserve District* v. *Caraher* (1921), 299 Ill. 11, 132 N. E. 211; *Department of Public Works & Buildings* v. *Lotta* (1963), 27 Ill. 2d 455, 189 N. E. 2d 238.

We have carefully reviewed the Railroad's argument that the State seeks to condemn personalty rather than realty and therefore a different rule should apply. The Railroad has proffered several cases as authority for its position: *Mackie* v. *Fegin* (1966), 2 Mich. App. 698, 141 N. W. 2d 312; *Board of County Commissioners* v. *Good* (1940), 44 N. M. 495, 105 P. 2d 470; *Michigan State Highway Com.* v. *McLaughlin* (1969), 16 Mich. App. 22, 167 N. W. 2d 468; *Board of County Commissioners* v. *Vargus* (1966), 76 N. M. 369, 415 P. 2d 57; *Michigan State Highway Com.* v. *Hahn* (1966), 4 Mich. App. 225, 144 N. W. 2d 643. These cases hold that when minerals are condemned in place, a per unit valuation (number of units multiplied by price per unit, *i.e.*, 50 cu. yd. x 3¢) is proper in fixing damage.

The Michigan cases are based in part on a Michigan statute (Mich. Comp. Laws § 213.171(b) (1948) (Mich. Stat. Ann. § 8.171(b) (1958))), which requires that the highway department must condemn materials as personalty. (*Mackie* v. *Fegin* (1966), 2 Mich. App. 698, 141 N. W. 2d 312.) The Michigan Court of Appeals in the *Mackie* case read that section of the statute in conjunction with other sections and found that the highway department could take whatever interest best suited its purpose. In the Michigan cases cited, that interest was in land and not in personalty. Thus consideration of minerals as personalty is not the established rule in Michigan.

The New Mexico cases do adopt a per unit valuation rule. However, that rule has not been followed in other States and we find no compelling reason to follow that rule in Illinois.

We believe that a per unit valuation in Illinois would confuse the jury. It would result in inflated land values and valuation based upon speculation. It would ignore completely the cost factors which are affected by management. It would force consideration of the need of the condemnor rather than the loss of the condemnee. We believe that this is undesirable and therefore we will not adopt the per unit valuation rule in Illinois.

This does not mean, however, that an appraiser cannot consider that minerals exist on the land and that there is a market for those minerals in determining the fair cash market value of

the land, as a whole, for its highest and best use. *Department of Public Works & Buildings* v. *Bohne* (1953), 415 Ill. 253, 113 N. E. 2d 319.

Both the State and the Railroad have cited *Department of Public Works & Buildings* v. *Oberlaender* (1969), 42 Ill. 2d 410, 247 N. E. 2d 888. The State argues that this case reaffirms the rule that land must be valued as a whole and that timber, minerals, and other elements are factors to be considered in the value of the land as a whole but may not in themselves be valued separately. The Railroad argues that this case is authority for the separate valuation of minerals when the right to take the minerals is condemned. We have carefully studied the *Oberlaender* case. We are most particularly aware of the factual situation and the reasoning of that decision. We believe that if minerals are being extracted from land as part of a business operation with an established market and a demonstrable cost accounting procedure, there may be some justification for valuing the minerals separate from the land. In every other case, there is no such justification.

• 3-6 We believe the proper rule to be that land is to be valued as a whole including all minerals, timber, improvements and appurtenances. The measure of the value of the land is the fair cash market value for its highest and best use, that is, the amount which a purchaser, willing but not obligated to buy, will pay to a seller, willing but not obliged to sell. The minerals, timber, improvements and appurtenances may be considered as factors in the determination of the fair cash market value, but under no circumstances is the fair cash market value to be the sum of such factors.

The second issue presented on appeal is whether it is improper to consider evidence in establishing market value which is based on the very public improvement for which the condemnation is concerned, even if it is on a "one-time" basis.

The State argues that the market created by the Interstate 474 project should not be considered in determining the fair cash

market value of the land sought. It further argues that the minerals here had not been sold by the Railroad prior to sale to a contractor working on the Interstate 474 project.

The Railroad argues that it had a real need for the minerals for its own purposes in constructing levees to aid in development of an industrial park. It also argues that the condemnation of its land was not contemplated until after purchases had been made from it by contractors using the minerals for the construction of the Interstate 474 and after unsatisfactory bids for more minerals had been received.

• 7, 8 We believe that the rule is well established in Illinois and in other jurisdictions that it is the loss to the condemnee and not the gain to the condemnor which is to be considered in determining the value of condemned lands. (*Peoples Gas Light & Coke Co.* v. *Buckles* (1962), 24 Ill. 2d 520, 182 N. E. 2d 169.) When land is taken as part of a project, any enhancement in the value of that land because of project cannot be considered.

• 9 Here, the only true market for the minerals was caused by the need for the minerals in the construction of the Interstate 474 project. The need of the Railroad for the materials did not create a market. Thus, consideration of the market demand created by the contractors herein would be improper.

The third issue presented on appeal is whether the $.12 per cubic yard price which was paid to the Railroad by a contractor working on the Interstate 474 project is admissible.

The State argues that valuation is a matter of judgment based upon the numerous factors dependent upon the type of property sought. The income approach of valuation can be used in special use situations, but there is no special use here.

The Railroad argues that if it is to be allowed to show an existing market for the minerals it must be allowed to show the unit price.

• 10 We agree with the State that allowing the Railroad to introduce evidence regarding the unit price would encourage the jury to think that a market for the minerals exists. It would not be a true indication of fair cash market value. Since we are unwilling to adopt the Railroad's theory regarding fair cash market value, we will not permit introduction of the per unit value.

The fourth point raised on appeal is whether the amount of fill removed following the quick-take and prior to trial is relevant and therefore admissible.

The State argues that such introduction invites the jury to multiply the gross amount of fill by the price per cubic yard and thereby arrive at the fair cash market value. This defeats the valuation of land as a whole. This also would lead to speculation and conjecture.

The Railroad argues that while the exact amount of minerals on the land is a matter of opinion, a minimum figure could be determined by establishing the amount already extracted.

• 11, 12 We have stated that any valuation based upon speculation is undesirable and improper. The introduction of testimony regarding the minerals already taken is clearly improper. We do not wish to set minimum figures. The proper value of the land is the fair cash market value, no more and no less.

The order of the Circuit Court of Peoria County is reversed and this cause is remanded for continuance of the trial in accordance with the views set forth in this opinion.

Reversed and remanded.

ALLOY, P. J., and STENGEL, J., concur.

APPENDIX C

ILLINOIS SUPREME COURT
Clell L. Woods, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

May 30, 1979

Received May 31, 1979
Cassidy, Cassidy, Mueller

Mr. John E. Cassidy, Jr.
Attorney at Law
Cassidy, Cassidy, Mueller & Price
800 Lehmann Building
Peoria, IL 61602

No. 50929—The Department of Transportation of the State of Illinois, etc., appellee, vs. Toledo, Peoria & Western Railroad Company, a Delaware Corporation, appellant. Appeal, Appellate Court, Third District.

The Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ CLELL L. WOODS
Clerk of the Supreme Court

Supreme Court, U.S.
FILED
SEP 24 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-322

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY,
A DELAWARE CORPORATION,
Petitioner,

vs.

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF ILLINOIS, FOR AND IN BEHALF OF THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF OF RESPONDENT.

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September 24, 1979.

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Respondent.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

The respondent agrees with the major portion of petitioner's Statement of the Case. Several matters contained in it do require clarification.

The portion of the highway project involved is the road-bed approach to a newly constructed bridge for Federal Aid Interstate Route No. 474. In close proximity is the Illinois River, adjacent to which the petitioner owns 610 acres (R. C353). The subject property consists of 42.6 acres lying at the bottom of the Illinois River, between its thread and 50 feet out from its river bank. Petitioner's river frontage or access to the river is not involved, since the taking commenced 50 feet off shore. In

fact, subsequent to the "quick-take", the petitioner dismissed its Cross Petition which had alleged damages to the remaining acreage.

In order to build the raised bridge approach, fill material totalling over one million cubic yards was piped from petitioner's submerged land to the highway project. At the "quick-take" hearing, the petitioner's assistant to the President testified to the value of the submerged acreage being worth $150,000.00 (C353). The respondent's valuation witness testified to the fair cash market value of the submerged land as being $1,000.00 (C378).

ARGUMENT.

Both parties are in agreement as to the Constitutional mandate of the Just Compensation Clause. At issue is the permissible method in determining the fair cash market value of what constitutes just compensation.

Contrary to the petitioner's ascertion at page 8 of its Petition, the State took a fee interest in the 42.6 acres of submerged land. It is certainly not conceded, as the petitioner asserts, that the taking was not contemplated by the scope of the original project. Involved is a single project, a single bridge, a single abutment cone and a single dike road. Without each of these component parts, there would be no interstate highway at this particular location. There were no enlargements of the project as described in *United States* v. *Miller,* 317 U. S. 369 (1942). It is undisputed that the nature of the taking was changed from the taking of an easement to the taking of a fee interest. The purpose remained the same, namely, for the construction of a segment of public highway, Interstate 474.

But for the highway construction project, there was neither a demand nor a market for the petitioner's river bottom fill. The *single sale* made by the petitioner during its ownership of the total property, which the petitioner started purchasing as far back as 1929 (R. C359), was made to a State contractor shortly prior

to the filing of the instant condemnation action. The fill material sold was used for the same bridge approach or cone (R. C232, C512). The subject property was used in connection with the dike road (R. C532), i.e. the extension of the cone. The cases appear to be quite consistent in holding that any special value to the condemnor must be excluded in arriving at a valuation. *United States* v. *Miller,* 317 U. S. 369 (1942); *United States* v. *Cors,* 337 U. S. 325 (1949); *United States* v. *Fuller,* 409 U. S. 488 (1973). As stated in *Cors,* at page 333:

> "It is not fair that the government be required to pay the enhanced price which its demand alone has created."

The Illinois Supreme Court's opinion recognized that compensation must be estimated for the "land as land" including the consideration of any minerals situated within the land. This approach was followed, rather than the simple, but speculative, method of "unit-times-price" method espoused by the petitioner. While this Court has not apparently ruled directly on the "unit-times-price" valuation method, the majority of the lower courts have rejected such a method of valuation. See 40 ALD Fed. 656.

CONCLUSION.

It is respectfully suggested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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